Supreme Court, U. S.
FILED
MAR 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1397

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

vs.

GREYHOUND COMPUTER CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO CONDITIONAL MOTION FOR LEAVE TO FILE PETITION AND PETITION FOR WRIT OF CERTIORARI, UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Greyhound hereby incorporates the Questions Presented in its brief in opposition to the petition for writ of certiorari in Docket No. 79-1396.

In addition, Greyhound states the petition of IBM in this docket number raises two additional questions, *viz.*:

2. Would an order under the "all writs" statute (28 U. S. C. § 1651(a)) result in a record from the Court of Appeals under which this Court can determine all questions presented by IBM's petition for a writ of certiorari?

3. Can this Court direct a writ of certiorari to the District Court for the District of Arizona when more than ninety days have elapsed since the entry of that court's order, and when there is a statutory permissive appeal for the review of certified interlocutory orders to the Court of Appeals which IBM has invoked?

STATEMENT

In addition to the statement made by Greyhound in Docket No. 79-1396, Greyhound makes the following additional statement.

IBM obviously is uncertain how to proceed to seek review of the order of the Court of Appeals of the ninth circuit under U. S. C. § 1292(b) denying permission to appeal because it has also filed under a "conditional motion for leave to file a writ of certiorari under 28 U. S. C. § 1651(a)." IBM's uncertainty apparently stems from the fact, so far as we can determine, this Court has never granted certiorari from an order of a court of appeals where that court has denied permission to appeal under 28 U. S. C. § 1292(b). The reason for this is stated in Wright & Miller, *Federal Practice and Procedure* (1978 ed.) § 4036, p. 13, footnote 18:

> "At the other extreme, the discretion to deny interlocutory appeal under 28 U. S. C. A. § 1292(b), described in vol. 16, §§ 3929-3931, is so broad that Supreme Court reversal should never be available; nonetheless, there is no apparent advantage in forcing hopeless petitions outside of statutory certiorari into common law certiorari on the ground that the application for leave to appeal did not bring the case into the court of appeals."

REASONS FOR DENYING THE WRIT

Greyhound hereby incorporates its statement of "Reasons for Denying the Writ" set forth in its brief in opposition to petition for writ of certiorari pursuant to § 1254(1) in Docket No. 79-1396 and adds the following.

1.

The Writ Should Be Denied Under 28 U. S. C. § 1651(a) Because This Court Cannot Determine from the Court of Appeals Record Whether This Case Is in Fact "of Such Extraordinary Complexity as to Exceed the Practical Abilities and Limitations of a Jury."

IBM's "Conditional Motion" and petition has been filed because Counsel are not certain whether this case was "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254(1). (Pet. 1) But whether the case was "in" or not and whether, since permission to appeal is discretionary, abuse of discretion must be shown before this Court should grant certiorari, a writ directed under another statute will not result in any different record being certified by the Court of Appeals.

As noted in our brief in opposition in 79-1396, the Court of Appeals record will consist merely of the District Court's order, IBM's petition, Greyhound's answer, and the Court of Appeals order. From this limited record, it will be impossible for this Court to determine whether this case is in fact too complicated for a jury to comprehend.

2.

A Writ of Certiorari Cannot be Directed to the District Court of Arizona Because Timely Application Has Not Been Made Under 28 U. S. C. § 1651(a) and Because the Writ Is Not Available Where the Remedy of Permissive Appeal Has Been Provided Which Was Available of by IBM.

Alternatively, IBM states that should this Court be of a view that the writ of certiorari properly be directed to the District Court for the District of Arizona, IBM prays that the Court treat this petition as a prayer for a writ of certiorari to that court. (p. 4) This cannot be done for the following reasons.

The District Court's Order was entered November 6, 1979. (App. B) The petition in this docket number was filed March

10, 1980. Under 28 U. S. C. § 2101(c), a writ of certiorari shall be "applied for within ninety days after the entry of such judgment or decree." More than ninety days has elapsed since the entry of the District Court's Order.

Although a common law writ of certiorari under 28 U. S. C. § 1651 has been used to bring before this Court's review, in exceptional circumstances, otherwise nonappealable orders (*United States Alkali Assoc.* v. *United States,* 325 U. S. 196; *DeBeers Ltd.* v. *United States,* 325 U. S. 202; *Far East Conf.* v. *United States,* 342 U. S. 570), writs under this section "are drastic and extraordinary remedies" reserved "for really extraordinary causes" in which an "appeal is a clearly inadequate remedy" and where there has been a clear abuse of discretion or usurpation of judicial power (*Ex Parte Fahey,* 332 U. S. 258, 260; *Will* v. *United States,* 389 U. S. 90, 106, 107; *Bankers Life Co.* v. *Holland,* 346 U. S. 379, 383.

Here there was an adequate remedy by permissive interlocutory appeal under 28 U. S. C. § 1292(b). IBM sought that remedy, the District Court granted a certificate, but permission to appeal was denied. IBM cannot, under the circumstances invoke the "all writs" statute.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit under 28 U. S. C. § 1651, or alternatively, to the District Court for the District of Arizona, should be denied.

Respectfully submitted,

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